IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DEBORAH BELL,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:11-CV-576-A
	§	
WAL-MART #2978/SAM AND EMPLOYEES	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION
and
ORDER

The court has not been persuaded that it has subject matter jurisdiction over the above-captioned action. Therefore, the court is ordering the action remanded to the state court from which it was removed.

I.

Background

On July 15, 2011, plaintiff, Deborah Bell, filed this action in the 342nd District Court of Tarrant County, Texas, against defendants, Wal-Mart #2978/Sam ("Wal-Mart") and Employees, later identified as Kirk Thompson ("Thompson") and Richard Kindred ("Kindred") (collectively, "the employees").[1] Plaintiff served

[1] On September 9, 2011, plaintiff filed a document titled "Motion for Leave to Supplement Jurisdiction and Supplemental [sic] Pleadings and Exhibits," in which she identified the two Wal-Mart employees as Kirk Thompson and Richard Kindred. Pl.'s Mot. at 2-3.

Wal-Mart on July 19, 2011.[2] The employees have not been served. Wal-Mart removed the case to this court on August 18, 2011. Now before the court are Wal-Mart's notice of removal and the state court pleadings attached thereto, plaintiff's motion to remand, Wal-Mart's response to plaintiff's motion to remand, a document filed by plaintiff titled "Motion for Leave to Supplement Jurisdiction and Supplemental [sic] Pleadings and Exhibits," and Wal-Mart's response to such motion. For the reasons set forth below, the court is granting plaintiff's motion to remand.

The background of this case is as follows: In her state court petition ("the petition"), plaintiff alleges that on May 19, 2011, she sustained severe personal injuries when Thompson and Kindred were loading a treadmill into her vehicle, and a dolly struck her in the head while she was in the parking lot of defendant's Wal-Mart Store in Fort Worth, Texas. Plaintiff alleges that Kindred asked her to stand behind the dolly to prevent it from rolling as they lifted the treadmill into her vehicle. Plaintiff alleges that when Thompson and Kindred lifted the treadmill, the dolly rose up and struck her.

Plaintiff then filed suit against Wal-Mart, Thompson, and Kindred. In her suit, she alleged claims or negligence,

---

[2] Although plaintiff sued and served Wal-Mart #2978, Wal-Mart Stores Texas, LLC is the proper party. Def.'s Notice of Removal at 2.

negligence per se, and respondeat superior against Wal-Mart and the employees, and negligent entrustment against Wal-Mart. In addition to exemplary damages, plaintiff seeks $1.3 million in damages as a result of a concussion, cervical strain, heart palpitations, mental and emotional anguish in the past and future, and medical care and expenses in the past and future. Pl.'s Pet. at 6-8.

Wal-Mart removed the case based on diversity jurisdiction. See 28 U.S.C. § 1332; § 1441(a). The minimum amount in controversy requirement for diversity jurisdiction is clearly met because the damages requested in plaintiff's state court petition exceeds $75,000. There is not, however, complete diversity of citizenship between plaintiff and defendants. Wal-Mart is a Delaware corporation with its principal place of business in Arkansas. Plaintiff is a Texas resident, and Wal-Mart concedes that the employees "are likely Texas residents." Def.'s Notice of Removal at 2.

The current dispute concerns the joinder of the employees as defendants. Whether the employees have properly been joined as defendants is the key to resolving the motions before the Court. Wal-Mart contends that the employees were fraudulently joined and

should be dismissed.[3] If the employees are dismissed as a party to this suit, then removal is warranted because there is complete diversity of citizenship between plaintiff and the remaining defendant Wal-Mart. Plaintiff, on the other hand, contends that the employees are proper defendants in this action. If plaintiff is correct, removal would be improper for two reasons: there would not be complete diversity between the plaintiff and the defendants as required by 28 U.S.C. § 1332, and one defendant would be a resident of the state in which the removal court sits, contrary to the provisions of 28 U.S.C. § 1441(b).

II.

Analysis

The court begins by noting that "the burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one." B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). In order to prove that a non-diverse defendant was fraudulently joined in a case to defeat diversity jurisdiction, the removing party must show either that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts or that there is no possibility that the plaintiff would be able to recover against the non-diverse defendant in state court. See

[3] Although defendants have not filed a motion to dismiss as to certain parties, Wal-Mart has requested that the employees be dismissed in both responses to plaintiff's motions.

Travis v. Irby, 326 F.3d 644, 649 (5th Cir. 2003); Smallwood v. Ill. Cent. R. R. Co., 385 F.3d 568, 573 (5th Cir. 2004). "If the plaintiff has any possibility of recovery under state law against the party whose joinder is questioned, then the joinder is not fraudulent in fact or law." Burden v. Gen, Dynamics Corp., 60 F.3d 213, 216 (5th Cir. 1995).

Wal-Mart is not alleging any fraud in plaintiff's pleading of jurisdictional facts. Hence for Wal-Mart to defeat plaintiff's motion for remand, Wal-Mart must establish that plaintiff has no possibility of recovering against the employees under Texas law.

In assessing a "no possibility of recovery" fraudulent joinder claim, the court must evaluate all of the contested factual allegations in the light most favorable to the plaintiff. See B., Inc., 663 F.2d at 549. In addition, the court must resolve all ambiguities concerning the current status of controlling state substantive law in favor of the plaintiff. See Travis, 326 F.3d at 648-49. "After all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the nonremoving party, the court determines whether that party has any possibility of recovery against the party whose joinder is questioned." Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1990).

The court concludes that Wal-Mart has not carried its burden of persuasion. Because there is ambiguity in the applicable state law as to whether plaintiff has a possibility of recovery against defendants, that ambiguity must be resolved in favor of plaintiff.

To prove that plaintiff cannot possibly recover against the employees, Wal-Mart relies on two decisions from the Texas Supreme Court, Leitch v. Hornsby, 935 S.W.2d 114 (Tex. 1996) and Tri v. J.T.T., 162 S.W.3d 552 (Tex. 2005). Leitch held that a corporate officer has no independent duty to furnish a safe workplace, and therefore that corporate officer cannot be held personally liable for the corporation's failure to provide a safe place to work. See id. at 120. Of particular significance for present purposes, Leitch explained that "individual liability arises only when the officer or agent owes an independent duty of reasonable care to the injured party apart from the employer's duty." Id. at 117; see also Tri v. J.T.T., 162 S.W.3d at 562 (citing Leitch v. Hornsby, 935 S.W.2d at 117). Tri, which followed shortly after, noted that the rule in Leitch limiting employee individual liability in a workplace safety claim also applied in a premises liability claim. See 162 S.W.3d at 562. Except for alter ego situations, "corporate officers and agents are subject to personal liability for their action within the

employment context only when they breach an independent duty of care." Leitch, 935 S.W.2d at 117.

The holding of Tri, however, did not definitively establish that in every instance employees owe no independent duty of care while acting within the scope of their employment. Instead, because "there [was] no record before [the Court] of what transpired at trial," the Court concluded that it could not decide the issue:

> We cannot determine whether [the employee] breached a duty that he owed to [the guests] separate from the duty his employer . . . owed to them. . . . We must presume that the trial court decided that [the employee] did not owe a duty to the [guests] separate and apart from that of his employer and that the facts support that determination because that presumption is in favor of the judgment the trial court rendered.

Tri, 162 S.W.3d at 563.

Thus, Tri did not resolve the question of whether the two Wal-Mart employees here owed an independent duty to plaintiff and could be held individually liable for their conduct. Leitch left open this possibility, providing as one example the case where an employee's negligence causes an auto accident while he is driving in the course and scope of employment. See Leitch, 935 S.W.2d at 117 (citing to Schneider v. Esperanza Transmission Co., 744 S.W.2d 595, 596-97 (Tex. 1987). In such a case, because the agent owes a duty of reasonable care to the general public

regardless of whether the auto accident occurs while driving for the employer, individual liability may attach. Id.

Lower courts in Texas have confirmed that employees who participate in tortious acts may be held individually liable regardless of whether they receive any benefit from the tortious act. See, e.g., Cass v. Stephens, 156 S.W.3d 38, 62-52 (Tex. App.--El Paso 2004, pet. denied); Gardner Mach. Corp. v. U.C. Leasing, Inc., 561 S.W.2d 897, 899 (Tex. Civ. App.--Beaumont 1978, writ dism'd). An employee may be held individually liable for an employer's tortious acts if he knowingly participates in the conduct or has knowledge of the tortious conduct, either actual or constructive. Portlock v. Perry, 852 S.W.2d 578, 582 (Tex. App.--Dallas 1993, writ denied). Leitch and Tri do not appear to modify these holdings.

Nor does either decision completely foreclose the possibility in this case that Wal-Mart's employees could owe an independent duty of reasonable care to the general public. For example, in plaintiff's motion entitled "Motion for Leave to Supplement Jurisdiction and Supplemental [sic] Pleadings and Exhibits," plaintiff alleges that Kindred "failed to maintain his independent duty which was to insure safety to others while within the course and scope of employment for Wal-Mart which was the approximately [sic] cause for the injuries Plaintiff alleged

she sustained in her original petition." Pl.'s Mot. at 4. Plaintiff further alleges that because the employee had "asked" her "to assist him" in holding the dolly, he "had an independent duty to make sure that the passage was clear and that he took proper action in order to maintain the safety to others." Id. Here, the employees were directly and personally involved in conduct that allegedly caused plaintiff's injuries. Such allegations at least raise the possibility that the employees breached an independent duty of care to her. Presented with such ambiguity, the court cannot say that Wal-Mart has met its burden to show that there is no possibility of recovery for the claims that plaintiff has asserted against the employees.

The Fifth Circuit has "cautioned against pretrying a case to determine removal jurisdiction." Hart v. Bayer Corp. 199 F.3d 239, 246 (5th Cir. 2000). Because the court must resolve contested issues of fact and legal ambiguities in the plaintiff's favor, see Travis, 326 F.3d at 649, the court concludes that plaintiff's allegations demonstrate that there is at least a possibility that she may bring a successful claim for negligence against the employees. Wal-mart has failed to meet its burden to demonstrate that she is unable to establish a cause of action against the employees in state court. Smallwood, 385 F.3d at 573. Consequently, the court lacks subject matter jurisdiction

over the action and is remanding it to the state court from which it was removed.

III.

Order

For the reasons given above,

The court ORDERS that the above-captioned action be, and is hereby, remanded to the state court from which it was removed.

SIGNED October 18, 2011.

JOHN McBRYDE
United States District Judge